Tey Por Yee & Anor v Protasco Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCC)-179–01 OF 2019, W-02(IM)(NCC)-715–04 OF 2019 AND W-02(IM)(NCC)-741–04 OF 2019
HAMID SULTAN, HANIPAH FARIKULLAH AND KAMALUDIN MD SAID JJCA
6 MARCH 2020

Civil Procedure — Discovery — Discovery of documents — Application for disclosure under Bankers' Books (Evidence) Act 1949 ('BBEA') — Application for documents disclosed under BBEA be admitted as evidence and marked as exhibit — Whether BBEA was alternative means of discovery against banker — Whether plaintiff ought to have first establish its right to discovery under the Rules of Court 2012 — Whether learned judge failed to specifically identify which of disputed documents were or were not banker's books — Whether documents which were outside of the scope of BBEA could be admitted under the Evidence Act 1950 — Bankers' Books (Evidence) Act 1949 ss 2, 4, 5 & 7 — Evidence Act 1950 ss 34 & 103(3) — Rules of Court 2012 O 24

Evidence — Documentary evidence — Bankers' books — Admissibility of — Admissibility under Bankers' Books (Evidence) Act 1949 and Evidence Act 1950 ('BBEA') — Whether documents that did not fall within definition of the Bankers' Books under the BBEA could still be admitted into evidence under the Evidence Act 1950 — Bankers' Books (Evidence) Act 1949 ss 2, 4, 5 & 7 — Evidence Act 1950 ss 34 & 103(3) — Rules of Court 2012 O 24

There were three appeals in the present case. Appeal No 179 was the second and third defendant's appeal against the decision of the High Court which allowed the plaintiff's application under encl 307 for disclosure under the provisions of the Bankers' Books (Evidence) Act 1949 ('the BBEA'). Appeal No 715 was the second and third defendants' appeal against part of the High Court's decision in dismissing the plaintiff's application via encl 395 but held that the documents that did not fall within the definition of the Bankers' Books under the BBEA could still be admitted into evidence under the normal course in line with the provisions of the Evidence Act 1950 ('the EA'). Appeal No 741 was the plaintiff's appeal against the whole of the High Court's decision which dismissed the plaintiff's application via encl 395 to have all the documents previously disclosed under the order granted pursuant to the BBEA to be admitted and/or taken as evidence and marked as exhibits. It ought to be noted that in the main suit, the plaintiff had sued the second and third defendants as the former directors of the plaintiff for breach of fiduciary duty ie in causing the

A plaintiff to purchase shares in oil exploration rights in Indonesia from the first defendant in which the second and third defendants had personal interest. In the present appeals, the defendants' case was that the plaintiff's applications in encl 307 and encl 395 made under the BBEA was misconceived and an abuse of process, having regard to the legislative intent of the BBEA and the B provisions for the third party discovery under O 24 r 7A of the Rules of Court 2012 ('the ROC'), as such, the court did not have the jurisdiction to grant the orders prayed for. Further, the application for discovery was a mere fishing expedition and that the plaintiff had, by application under the BBEA, sought in effect to reverse the burden of proof, which was impermissible in law. On the C other hand, the plaintiff's case was that the contention that the legislative intent of the BBEA, the provisions of the Act did not provide a party with an independent right of discovery was unsustainable. The plaintiff argued that the provisions of the BBEA only provided a mechanism in which a document already obtained pursuant to a discovery application under O 24 r 7A of the D ROC may be proved at trial.

Held, allowing Appeal Nos 179 and 715 and dismissing Appeal No 741:

(1) The court agreed with the defendants that the BBEA was created to E merely facilitate the proving of banking transactions through the admission of bankers' evidence. It was not intended to serve as an alternative means of discovery against bankers. The ordinary principles of discovery would not be applicable in an application under s 7 of BBEA. This was underscored by the fact that there was a specific legal framework F for discovery in Malaysia ie O 24 of the ROC. Therefore, the decisions of the learned judge were erroneous. The plaintiff ought to have first establish its right to discovery under the ROC. In addition, the learned judge failed to specifically identify which of the disputed documents were or were not banker's books (see para 100).

G (2) The plaintiff would not be permitted to adduce under the EA documents that were improperly disclosed. Those disputed documents should be excluded for being outside the scope of the BBEA for not being copies of entries in banker's books within the meaning of s 2 of the BBEA. The plaintiff was required to prove and verify any of the disputed documents H that fell within the permissible scope of the BBEA orders under ss 4–5 of BBEA. Failing that, the plaintiff was not permitted to rely on the disputed documents on the strength of the EA (see para 100).

[Bahasa Malaysia summary

I Terdapat tiga rayuan dalam kes ini. Rayuan No 179 adalah rayuan defendan kedua dan ketiga terhadap keputusan Mahkamah Tinggi yang membenarkan permohonan plaintif berdasarkan lampiran 307 untuk penzahiran di bawah peruntukan Akta Buku Banker (Keterangan) 1949 ('ABBK'). Rayuan No 715 adalah rayuan defendan kedua dan ketiga terhadap sebahagian keputusan

Mahkamah Tinggi dalam menolak permohonan plaintif melalui lampiran 395 tetapi berpendapat bahawa dokumen yang tidak termasuk dalam definisi Buku Banker di bawah ABBK masih boleh diterima masuk sebagai keterangan di bawah cara biasa selaras dengan peruntukan Akta Keterangan 1950 ('AK'). Rayuan No 741 adalah rayuan plaintif terhadap keseluruhan keputusan Mahkamah Tinggi yang menolak permohonan plaintif melalui lampiran 395 agar semua dokumen yang sebelumnya dinyatakan di bawah perintah yang diberikan berdasarkan ABBK untuk diterima dan/atau diambil sebagai keterangan dan ditandakan sebagai ekshibit. Harus diingat bahawa dalam saman utama, plaintif telah memfailkan saman ke atas defendan kedua dan ketiga sebagai mantan pengarah plaintif kerana melanggar tanggungjawab fidusiari yang menyebabkan plaintif membeli saham hak eksplorasi minyak di Indonesia dari defendan pertama di mana defendan kedua dan ketiga mempunyai kepentingan peribadi. Dalam rayuan ini, kes defendan-defendan adalah bahawa permohonan plaintif dalam lampiran 307 dan 395 yang dibuat di bawah ABBK adalah salah dan penyalahgunaan proses, dengan mempertimbangkan maksud perundangan ABBK dan peruntukan untuk penzahiran pihak ketiga di bawah A 24 k 7A Kaedah-kaedah Mahkamah 2012 ('KKM'), oleh itu, mahkamah tidak memiliki bidang kuasa untuk membenarkan perintah yang dimohon. Selanjutnya, permohonan penzahiran adalah 'fishing expedition' semata-mata dan bahawa plaintif, melalui permohonan di bawah ABBK, berusaha untuk menterbalikkan beban pembuktian kepada defendan-defendan, yang tidak diizinkan oleh undang-undang. Sebaliknya, kes plaintif adalah bahawa hujahan bahawa maksud perundangan ABBK, peruntukan dalam Akta tersebut tidak memberikan hak penzahiran tersendiri kepada sesuatu pihak adalah tidak berasas. Plaintif berhujah bahawa peruntukan ABBK hanya menyediakan mekanisma di mana dokumen yang telah diperoleh berdasarkan permohonan penzahiran di bawah A 24 k 7A KKM boleh dibuktikan dalam perbicaraan.

Diputuskan, membenarkan Rayuan No 179 dan Rayuan No 715; menolak Rayuan No 741:

(1) Mahkamah bersetuju dengan defendan-defendan bahawa tujuan ABBK dibuat hanyalah untuk mempermudahkan pembuktian transaksi perbankan melalui penerimaan keterangan banker. Ia tidak dimaksudkan untuk berfungsi sebagai cara alternatif untuk penzahiran terhadap banker. Prinsip penzahiran biasa tidak akan terpakai dalam permohonan di bawah s 7 ABBK. Ini ditegaskan oleh fakta bahawa terdapat kerangka undang-undang khusus untuk penzahiran di Malaysia iaitu A 24 KKM. Oleh itu, keputusan hakim yang bijaksana adalah salah. Plaintif harus terlebih dahulu membuktikan haknya untuk penzahiran di bawah KKM. Sebagai tambahan, hakim yang bijaksana gagal untuk secara khusus mengenal pastis sama ada dokumen-dokumen yang dipertikaikan adalah buku banker atau bukan (lihat perenggan 100).

(2) Plaintif tidak dibenarkan untuk mengemukakan dokumen-dokumen yang didedahkan dengan tidak betul tersebut di bawah AK. Dokumen-dokumen yang dipertikaikan tersebut harus dikecualikan memandangkan dokumen-dokumen tersebut berada di luar ruang lingkup ABBK kerana dokumen-dokumen tersebut bukan merupakan salinan entri dalam buku banker seperti yang dinyatakan di dalam s 2 ABBK. Plaintif dikehendaki membuktikan dan mengesahkan mana-mana dokumen yang dipertikaikan yang termasuk dalam skop perintah ABBK yang dibenarkan di bawah ss 4–5 ABBK. Sekiranya gagal, plaintif tidak dibenarkan bergantung pada dokumen-dokumen yang dipertikaikan berdasarkan peruntukan AK (lihat perenggan 100).]

Cases referred to

Arnott v Hayes (1887) 36 ChD 731, CA (refd)
Ashworth Hospital Authority v MGN Ltd [2002] 4 All ER 193, HL (refd)
Attorney-General v HRH Prince Ernest Augustus of Hanover [1957] 1 All ER 49, HL (refd)
Bankers Trust Co v Shapira and Others [1980] 1 WLR 1274, CA (refd)
Barker v Wilson [1980] 2 All ER 81, QBD (refd)
Bell ExpressVu Limited Partnership v Rex [2002] 2 RCS 559 (refd)
Bhimji and Others v Chatwani and Others (No 2) [1992] 1 WLR 1158, Ch D (refd)
Board of Trustees of the Port of Bombay v M/s Sriyanesh Knitters AIR 1999 SC 2947, SC (refd)
Douglas and Others v Pindling [1996] 3 LRC 460, PC (refd)
Eagle Star Insurance Co Ltd v Arab Bank plc (25 February 1991, unreported), HC (refd)
First Malaysia Finance Bhd v Dato' Mohd Fathi bin Haji Ahmad [1993] 2 MLJ 497, SC (refd)
Goh Hooi Yin v Lim Teong Ghee & Ors [1977] 2 MLJ 26 (refd)
Howglen Ltd, Re [2001] 2 BCLC 695, Ch D (refd)
Idiots' Asylum v Handysides (1906) 22 TLR 573, CA (refd)
Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590, FC (refd)
Norwich Pharmacal Co and Others v Customs and Excise Commissioners [1974] AC 133, HL (refd)
Panglima Tentera Laut Diraja Malaysia & Ors v Simathari a/l Somenaidu [2017] 2 MLJ 14, FC (refd)
Pean Kar Fu v Malayan Banking Bhd (Toh Boon Pin, intervener) [2004] 5 MLJ 519, HC (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
R v Dadson (1983) 147 JP 509 (refd)
Shah & Co v State of Maharashtra 1967 AIR SC 1877 (refd)

Shun Kai Finance Co Ltd & Ors v Japan Leasing (HK) LTD (in liq) (No 2) [2001] 1 HKC 636, CA (refd)
Sim Siok Eng & Anor v Poh Hua Transport And Contractor Sdn Bhd [1980] 2 MLJ 72, FC (refd)
Syarikat Jengka Sdn Bhd v Abdul Rashid bin Harun [1981] 1 MLJ 201, FC (refd)
Tournier v National Provincial and Union Bank of England [1924] 1 KB 461, CA (refd)
Wee Soon Kim Anthony v UBS AG [2003] 2 SLR 91; [2003] 2 SLR(R) 91 (refd)
Wheatley v Commissioner of Police of the British Virgin Islands [2006] 1 WLR 1683, PC (refd)
Williams v Williams; Tucker and others v Williams and another [1987] 3 All ER 257, CA (refd)

Legislation referred to

Bankers Books Evidence Act 1879 [UK] s 7
Bankers' Books Evidence Act (Cap 53) [BS]
Bankers' Books (Evidence) Act 1949 ss 2, 3, 4, 5, 6, 7
Banking Act 1979
Banking and Financial Institutions Act 1989 (repealed by Financial Services Act 2013)
Central Bank of Malaysia Act 2009
Companies Act 1965 (repealed by Companies Act 2016) s 4(1)
Companies Act 2016 s 2
Evidence Act 1950 ss 3, 34, 90A, 90A(1), (2), 90C, 103, 130, 130(3)
Financial Services Act 2013 ss 2, 133, 133(1), (2), 134(1), (4), 145, Schedule 11
Rules of Court 2012 O 24, O 24 rr 3, 3(1), 4, 7, 7(1), 7A, 7A(1), 7A(2), 8, 9, 10, 10(1), 11(1), Form 43
Rules of the High Court 1980

Appeal from: Suit No 22NCC-362–09 of 2014 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (R Jayasingam, Lim Yvonne, Ng Keng Yang and Khoo Suk Chyi with him) (BH Lawrence & Co) for the appellants.
S Sivaneindiren (Peter Skelchy and Joycelyn Teoh with him) (Cheah Teh & Su) for the respondent.

Kamaludin Md Said JCA:

INTRODUCTION

[1] There are three appeals heard by this court namely:

(a) appeal No 179 is concerned on the second and third defendant's appeal against the whole of the High Court order dated 7 January 2019 which allowed the plaintiff's application under encl 307 for disclosure under the provisions of the Bankers' Books (Evidence) Act 1949 ('the BBEA');

(b) appeal No 715 related to the second and third defendants' appeal against part of the High Court decision given on 15 March 2019 which dismissed the plaintiff's application via encl 395 to have all the documents previously disclosed under the orders granted pursuant to the BBEA to be admitted and/or taken as evidence and marked as exhibits. This appeal is essentially against the part of the learned High Court judge's decision that the documents that do not fall within the definition of the banker's book under the BBEA can still be admitted into evidence under the normal course in line with the provisions of the Evidence Act 1950 ('the EA'); and

(c) appeal No 741 is the plaintiff's appeal against the whole of the High Court decision given on 15 March 2019 which dismissed the plaintiff's application via encl 395 to have all the documents previously disclosed under the order granted pursuant to the BBEA to be admitted and/or taken as evidence and marked as exhibits.

[2] For clarity, the parties will be referred to like what they were referred to at the High Court as the plaintiff and the defendants respectively.

[3] All three appeals relate to the objections by the second and third defendants in the main action against the disclosure of documents in the hands of the banks relating to financial transactions involving the second and third defendants and/or entities controlled and/or owned by them concerning the plaintiff's monies.

THE HIGH COURT'S DECISION

[4] In determining encls 307 and 395, the learned judge had made the findings as follows:

Enclosure 307

The BBEA provided an alternative and/or specific means of discovery in respect of banker's books. In determining whether to grant an order under s 7 of the BBEA, the ordinary principles of discovery would be applicable. On the basis of modernised definition, there was no need to comply with ss 4 and 5 of the BBEA.

Enclosure 395

In respect of BBEA Order 1:

Any documents that were improperly disclosed pursuant to an order granted under s 7 of the BBEA could nevertheless be admitted under the EA. There was no need to comply with ss 4 and 5 of the BBEA as s 3 of the BBEA must be understood in the context of modern banking practice and the provisions of the Evidence Act 1950.

In respect of BBEA Order 2:

There was no need to comply with ss 4 and 5 of the BBEA as s 3 of the BBEA must be understood in the context of modern banking practice and the provisions of the EA. If a document falls within the meaning of a 'banker's book' under s 2 of the BBEA, and 'an original had provided (such as a print-out of data stored within a computer system operated and maintain by the bank)', all that was necessary was for a certificate to be tendered pursuant to s 90A(2) of the EA. In such a case, there was no need for compliance with ss 4 and 5 of the BBEA. Any documents that were improperly disclosed pursuant to an order granted under s 7 of the BBEA could nevertheless be admitted under the EA.

GROUNDS OF APPEALS

Appeal No 179

[5] The second and third defendant's grounds of appeal are as follows:

(a) the learned judge had erred in law and/or in fact in failing to five proper and due judicial consideration to the fact that the plaintiff's application in encl 307 was an abuse of process. In this regard:

(i) in failing to appreciate that encl 307 was in effect an application for, inter alia, specific discovery against third party banks and against the defendants, provisions for which are set out under O 24 r 7 and 7A of the ROC;

(ii) in failing to take cognisance of the fact that the plaintiff did not seek for specific discovery under O 24 r 7 and 7A of the Rules of Court 2012 ('the ROC') and that the reliance on the inherent jurisdiction of the court does not allow for a circumvention of the same; and

(iii) in failing to recognise that the plaintiff had in effect circumvented the provisions under the ROC by making an application for

A discovery under the cover of an application for orders under BBEA.

(b) the learned judge had erred in law and/or in fact in failing to appreciate the main purpose and object of the BBEA. In this regard:

B (i) in failing to appreciate and consider that the main object of the provisions of BBEA is to relieve bakers from the necessity of attending and producing books as evidence in court; and

(ii) in failing to appreciate and consider that the BBEA does not give any new power of discovery (or introducing an alternative method C of discovery) or alter the principles of law or the practice with regard to discovery;

(c) the learned judge had erred in law and/or in fact in failing to recognise that encl 307 was a fishing expedition. In this regard:

D (i) in failing to take cognisance of the fact that the plaintiff did not have adequate basis to mount its pleaded claim pertaining to fraud and conspiracy against the defendants;

(ii) in failing to consider the plaintiff failure to explain and/or E demonstrate the relevance of the orders sought in encl 307 to its pleaded case; and

(iii) in failing to consider that encl 307 was tantamount to an unjustified gross invasion of the defendants' privacy.

F (d) the learned judge had erred in law and/or in fact in failing to appreciate and consider that the defendants have sworn in their respective affidavits that the matters sought to be inspected are not relevant to SPA 1 and SPA 2 and therefore the defendants' affidavits are conclusive and no order for inspection should be made by the honorable High Court; and

G (e) the learned judge had erred in law and/or in fact in failing to hold that the plaintiff in effect sought to reverse the legal burden, and was ultimately compelling the defendants to prove that they did not do the things the plaintiff complains of.

H *Appeal No 715*

[6] The second and third defendant's grounds of appeal are as follows:

(a) the learned judge had erred in law and/or in fact in determining that the I plaintiff was entitled to seek that copies of documents that it procured from a bank under the authority of the BBEA orders, such copies not amounting to copies of entries in bankers' books within the meaning of the BBEA, be admitted into evidence under the EA. In this regard:

(i) in failing to take cognisance of the fact that the BBEA only permits

the plaintiff to inspect and make copies of documents obtained from a bank which amount to entries in bankers' books as defined under the BBEA; and

(ii) in failing to appreciate the fact that such documents are subject to banking privacy and should not be admitted in evidence under EA if such documents do not amount to entries in bankers books as defined under the BBEA.

(b) the learned judge had erred in law and/or in fact in determining that the plaintiff was entitled to seek that documentary evidence that it procured from a bank under the authority of the BBEA orders be admitted into evidence under EA despite such documentary evidence falling outside the scope of the BBEA orders. In this regard:

(i) in failing to appreciate the fact that such documents are subject to banking privacy and should not be admitted in evidence if such documents fell outside the scope of the BBEA orders;

(ii) in failing to determine that if the bank had delivered documents which were not within the definition of bankers' books, the documents should be disregarded and the plaintiff is not entitled to retain any copies of the same;

(iii) in failing to determine that copies of documents obtained from a bank under the authority of the BBEA orders can only be admitted as evidence if they can be proven pursuant to ss 4 and 5 of the BBEA; and

(iv) in determining that if the bank had delivered a document which did not fall within the definition of bankers' books, the plaintiff was nonetheless entitled to seek copies of those documents to be admitted into evidence under the EA;

(c) the learned judge had erred in law and/or in fact in determining that the provisions of the BBEA are to be interpreted in a manner that is inconsistent with settled principles of statutory interpretation. In this regard:

(i) in determining that the provisions of the BBEA are to be interpreted in the context of modern banking practice, notwithstanding the fact that principles of statutory interpretation require that the natural and ordinary meaning be given in construing a statue; and

(ii) in determining that the provision of the BBEA are to be interpreted by referrence to the provision of the BBEA notwithstanding the fact that the BBEA itself had already provided specific rules on admissibility of bankers' books in evidence.

Appeal No 741

[7] The plaintiff's grounds of appeal that the learned judge erred in fact and/or in law are as follows:

(a) in dismissing the plaintiff's application under the BBEA (encl 395) for the documents disclosed pursuant to order (encl 48) dated 25 June 2018 and order (encl 307) dated 7 January 2019 be admitted as evidence and marked as exhibits;

(b) in failing to appreciate and/or properly appreciate that the orders prayed for in the plaintiff's application under the BBEA (encl 395) are consequential and/or are a proper consequence to order (encl 48) dated 25 June 2018 and order (encl 307) dated 7 January 2019 obtained from the banks pursuant to the applications of the plaintiff made in encl 48 and encl 307 under the BBEA;

(c) in failing to appreciate and/or properly appreciate that the documents obtained from the banks pursuant to the applications of the plaintiff made in encls 48 and 307 under the BBEA represented records maintained by the bank in relation to the transactions of a customer and correspondingly constituted 'books' within the definition of the BBEA;

(d) in failing to adopt a purposive approach in defining the term 'bankers' books' under the BBEA; and

(e) in taking into account irrelevant considerations and/or in not taking relevant considerations in arriving at the learned judge's said decision.

THE APPEAL

[8] The defendant's case is that the plaintiff's applications in the encls 307 and 395 made under the BBEA was misconceived and an abuse of process, having regard to the legislative intent of the of the BBEA and the provisions for the third party discovery under O 24 r 7A of the ROC. Because of this the court did not have the jurisdiction to grant the orders prayed for. The application for discovery was a mere fishing expedition and that the plaintiff has, by application under the BBEA, sought in effect to reverse the burden of proof, which is impermissible in law. The plaintiff's case is that the argument that the legislative intent of the BBEA, the provisions of the Act do not provide a party with an independent right of discovery is unsustainable. The plaintiff contended that the provisions of the BBEA only provides a mechanism in which a document already obtained pursuant to a discovery application under O 24 r 7A of the ROC may be proved at trial.

[9] Having heard the submissions and perusal of the plaintiff's application in encls 307 and 395 in the records of appeal, our preliminary view is that the

plaintiff's applications appear to be applications for specific discovery under O 24 of the ROC 2012. The applications for discovery cannot be made under s 7 of the BBEA because s 7 of the BBEA, the purpose of which is only for an order to inspect and take copies of any entries in a banker's book for any purposes of proceedings. It is not a discovery provision. The discovery of documents made in encls 307 and 395 is made against the bank which is non party to the legal proceedings to produce the documents and involved the second and third defendant.

[10] In that circumstances, application for discovery ought to have been made under O 24 r 7A of the ROC which provides discovery against other person. In this context, as provided under O 24 r 7A(1) of the ROC if an application for an order for the discovery of documents before the commencement of proceedings it shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons. Under O 24 r 7A(2) of the ROC, if an application after the commencement of proceedings for an order for the discovery of documents by a person who is not a party to the proceedings shall be made by a notice of application, which shall be served on that person personally and on every party to the proceedings.

[11] Our preliminary view is that the plaintiff's application in encls 307 and 395 purportedly made under BBEA without reference to O 24 r 7A(2) of the ROC, would amount to an abuse of court process.

[12] However, since we have not made final determination in this matter, we required parties to put in further written submissions focussing on whether application under the BBEA to inspect and take copies of any entries of banks book is in effect an alternative procedure for discovery. The further written submissions may highlight the difference between discovery proceeding under ROC and inspection provision under BBEA for our considerations. Most importantly what is the underlying principle and intention under BBEA. We adjourned the hearing of the appeal for decision to a date to be fixed.

[13] Upon receiving the further written submissions as requested and together with the main written submissions, we were able to make determination on the issue. Having considered all submissions placed before us and after perusing the records of appeal including the grounds of judgment of the learned judge and encls 307 and 395 which are the subject matter in this appeals, we found merits in the second and third defendants' appeal. It is our unanimous decision that the defendants' appeals are allowed and the plaintiff's appeal is dismissed. Since the main trial has not been completed, we ordered all costs to be costs in the cause. We gave our reasons.

A BRIEF FACTS

[14] The plaintiff, Protasco Bhd is a public listed company listed on the Main Board of Bursa Securities Malaysia. The plaintiff's principal business is in construction, education, property development, road maintenance and other related business. The second and third defendants are the former directors of the plaintiff. In the main suit, the plaintiff is claiming for breach of fiduciary duty by the second and third defendants to cause the plaintiff to purchase shares in oil exploration rights in Indonesia from the first defendant. The plaintiff alleges that the second and third defendants had personal interest in the first defendant and claimed that the second and third defendants failed to disclose their personal interest and subsequently breach of their fiduciary duty as directors. Therefore, the plaintiff seeks, among others, to recover the sum of USD27m from the second and third defendants.

[15] The plaintiff sought and obtained an order dated 25 June 2018 pursuant to s 7 of the BBEA (encl 48). The information obtained from the order led the plaintiff to make a further application in encl 307 under the BBEA in order to ascertain where the moneys had flowed from the related and associate companies and to inspect as well as to obtain copies of certain documents in possession of Malayan Banking Bhd and CIMB Bank Bhd. The plaintiff contended that these documents establish a trail of payments of money that ultimately wound its way back into the pocket of the second and third defendants. This application was allowed on 7 January 2019. Later, the plaintiff made a subsequent application in encl 395 for the court to determine the admissibility of certain documents disclosed pursuant to the order of 7 January 2019 and a prior order of 25 June 2018 which was dismissed by the learned judge.

G CHRONOLOGY OF EVENTS

[16] The chronology of events are shown in the table below:

Date	Particulars of proceedings
22 September 2014	The plaintiff commenced an action against the second and third defendants ('the suit'). The suit is pending before the High Court. The pleaded claim against the second and third defendants centres on their having, in breach of duties owed by them to the plaintiff, induced the plaintiff into entering two sales and purchase agreements ('the SPAs') with the first defendant, and for further inducing payments made pursuant to the SPAs for the benefit of the second and third

	defendants. This is contended on the footing that the second and third defendants had conspired with the first defendant to injure the plaintiff through fraud, thereby unlawfully interfering with the business of the plaintiff.
12 December 2014	The plaintiff filed encl 48, an ex parte application for discovery against CIMB Bank Bhd and/or CIMB Islamic Bank Bhd to allow the plaintiff to, inter alia, inspect and take copies of all entries in the books of the banks in relation to bank accounts belonging to the first defendant. Enclosure 48 was filed under s 6 and/or 7 of the BBEA and/or O 92 r 4 of the Rules of Court ('the ROC'). Enclosure 48 did not concern the second and third defendants. Enclosure 48 was allowed by the High Court on 25 June 2018 ('BBEA Order 1'). The High Court did not provide any written grounds of judgment.
18 October 2018	The plaintiff filed encl 307 for discovery against CIMB Bank Bhd and/or CIMB Islamic Bank Bhd and/or Maybank Bhd to allow the plaintiff to, inter alia, inspect and take copies of all entries in the books of the banks in relation to bank accounts belonging to the second and third defendants. Enclosure 307 was similarly filed pursuant to s 6 and/or 7 of the BBEA and/or O 92 r 4 of the ROC. In the supporting affidavit, the plaintiff's then Director of Corporate Finance deposed to a belief that: (a) 'the entries in the books of Maybank Bhd, CIMB Bank Bhd and/or CIMB Islamic Bank Bhd relating to the accounts (belonging to the second and third defendants) and the documentation relating to the inflow and outflow of funds from the said accounts are extremely material to a critical issue in the plaintiff's claim, which is the ownership of the first defendant and the end beneficiaries of the plaintiff's monies'; and (b) 'the information and documentation sought by the order prayed for herein will reveal that the plaintiff's monies paid (pursuant to the SPAs) were ultimately channeled back to the second and third defendants either through themselves or persons and/or entities connected and/or controlled and/or related to them'. The plaintiff did not identify any of the documents sought as being 'banker's book' within the meaning of s 2 of the BBEA.

	The second and third defendants opposed to encl 307 on the following basis: Enclosure 307 was misconceived in law for it being, in substance, an application for discovery. As such, the plaintiff ought to have filed the application under the ROC. The provisions in the BBEA could not be relied on to circumvent the strictures on discovery under the ROC; and In any event, the orders sought were wide and all encompassing, and oppressive by reason of their being so. Enclosure 307 was in effect a fishing expedition and was therefore tactical in nature. In the upshot, encl 307 was an abuse of the process of the High Court.
7 January 2019	The High Court allowed encl 307 ('BBEA Order 2'). Aggrieved, the second and third defendants filed Civil Appeal 179.
14 February 2019	BBEA Order 2 was stayed by the Court of Appeal. By which time the banks concerned had produced copies of some documents. On the first day of trial, the plaintiff sought to admit the documents ('the disputed documents') disclosed pursuant to BBEA Order 1 and BBEA Order 2 ('the BBEA orders') as evidence through its first witness, the then Director of Corporate Finance of the plaintiff. The plaintiff sought to do this without regard to the provisions of the BBEA. Pertinently, as produced before the High Court, the disputed documents were in two separate bundles and were unsorted, the said documents having merely been split into two categories — documents purportedly obtained under BBEA Order 1 marked as Bundle C1 and documents purportedly obtained under BBEA Order 2 marked as Bundle X1. The plaintiff did not consider the provisions of the BBEA, and the BBEA orders, as to what documents were admissible and the requirements for proving the same. The second and third defendants objected to this course of action on the basis that any attempt to introduce the disputed documents was necessarily circumscribed by the BBEA, the BBEA orders having to be read in light of the provisions of the legislation.
22 February 2019	The plaintiff filed encl 395 for the disputed documents to be admitted and/or taken as evidence and marked as exhibits pursuant to ss 2, 3, 4, 5 and/or 6 of the BBEA and/or O 92 r 4 of the ROC. The plaintiff's basis for encl 395 was as follows:

	The orders sought for in encl 395 'are consequential and/or are a proper consequence to' encls 48 and 307; The disputed documents 'are documents obtained pursuant to the provisions of the (BBEA)'; and The disputed documents 'are documents which form part of the records kept by the bank of transactions relating to the bank's business'. The second and third defendants opposed encl 395 on the following grounds: The disputed documents derived from sources that were not within the definition of 'banker's book' under s 2 of the BBEA. For that reason, the contents of the disputed documents could not be said to be 'entries' within the meaning of the BBEA. The broad categorisation of the disputed documents suggested by the second and third defendants can be found in Annexure A. This is explained further in para 38.2(c) below. Some of the disputed documents did not fall within the scope of the BBEA orders. This is explained further in para 38.3(a)(iii) below; and Critically, none of the disputed documents had been proven as required under the BBEA, specifically ss 4 and 5 of the BBEA.
15 March 2019	The High Court made an order for encl 395 to be 'dismissed without affecting the plaintiff's rights to adduce the relevant documents at the trial'. The learned judge however arrived at legal conclusions on the nature of the documents that were admissible under the BBEA, and the mode of proof for the same. The learned judge further concluded that any of the disputed documents which were later found to be wrongfully disclosed viz in the event of a successful appeal against encl 307, or which could not be proved under the BBEA could nevertheless be admitted under the Evidence Act 1950 ('the EA') since the plaintiff now had possession of the same.
18 November 2019	The trial is scheduled to resume.

SUBMISSIONS

Appeal Nos 179, 715 and 741

[17] The defendants referred to ss 3, 4 and 5 of the BBEA, and argued that

A the framework of BBEA lies in the those key sections which set out certain conditions that must be complied with. Section 3 says that a copy of any entry in a banker's book in all legal proceedings be received as prima facie evidence of such entry and of the matters, transactions and accounts therein recorded but before admitting of a copy of a banker's book entry into evidence, a bank officer B must prove by either oral or affidavit evidence that the book was, at the time of the making of the entry, one of the ordinary books of the bank; the entry was made in the usual and ordinary course of business and the book is in the custody or control of the bank.

C

[18] First thing to be observed is the definition of banker's book itself which in s 2, banker's book includes any ledger, day book, cash book, account book and any other book used in the ordinary business of a bank. Section 5 of the BBEA further requires that the person who verified the copy against the original entry to prove, by either oral or affidavit evidence, that the copy has D been examined with the original entry and is correct as a pre-condition to such copy being admitted as evidence. Only if these conditions are fulfilled will a copy of any entry be received as prima facie evidence.

E **[19]** Section 6 of the BBEA provides that in any legal proceedings to which the bank is not a party, a bank officer shall not be compellable to produce any banker's book or to appear as a witness to prove the matters, transactions and accounts therein recorded where the contents of a banker's book could be proven under BBEA viz ss 3, 4 and 5, unless by order of a judge made for special F cause. This according to the defendant reinforces s 130(3) of the EA, in so far as the underlying purpose of BBEA in concerned ie to avoid the need for bankers to give formal evidence of banker's books entries.

[20] Section 7 of the BBEA has to be understood in the context of s 130(3) G of the EA and s 6 of the BBEA, as well as provisions of law concerning banking secrecy. It was submitted that this provision enables a party to any legal proceedings to apply ex parte for an order to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. Though it would appear at first blush that s 7 of the BBEA empowers a court to enable H discovery, closer consideration of the provision in the context of the statute as a whole would show that this is not the case. The defendant's case is that the BBEA cannot be invoked for the purpose of seeking discovery.

[21] The underlying purpose of banker's books legislation is to preclude the I need for a banker to attend legal proceedings to lead formal evidence on banker's books entries. A banker is obliged by law to maintain the secrecy of a customer's banking information save unless otherwise exempted from doing so. It is for that reason that when an order is made under BBEA, it is subject to an implied undertaking that copies of entries in banker's books provided under

the authority of an order of court are not to be used for collateral purpose. Any documents obtained under the cover of BBEA could be only be used for the admission of banking documentary evidence into evidence.

[22] There is a specific legal framework for discovery in Malaysia, specifically O 24 of the ROC. Prior to the coming into force of the ROC, the Rules of the High Court 1980 ('the RHC') similarly provided for discovery (though non-party discovery was dealt with through the application of common law principles). It is in this context that consideration should be given to the existence of a specific legal framework for discovery in Malaysia, previously under the RHC, and now, the ROC. The ROC is an exhaustive code providing no room for the exercise of any common law principles of discovery. It was submitted that this carries with the following legal implications. If a party is seeking discovery against a bank as a non-party, that party must apply for discovery under O 24 r 7A(2) of the ROC. If this is prior to the commencement of action, then the application is moved under O 24 r 7A(1) of the ROC.

[23] As it is intended to facilitate the proving of copies of entries in banker's books, the BBEA can only be invoked in the following circumstances, the right to discovery being an essential pre-requisite to the making of an order:

(a) where Party A has obtained discovery against Party B to the legal proceedings, and thereby determines that a bank has entries in banker's books that are relevant to the legal proceedings and, Party B is not in possession of a copy of said entry. In such an instance, Party A can seek inspection under s 7 of the BBEA and take a copy from the bank. That copy is to be admitted into evidence only upon fulfilment of ss 3–5 of the BBEA as discussed above; and

(b) where Party A has a copy of an entry in a banker's book but there is a dispute as to the said copy being admitted on the ground of its authenticity, then Party A is entitled to make an application under s 7 of the BBEA to inspect and take a copy from the bank. That copy is to be admitted into evidence only upon fulfilment of ss 3–5 of the BBEA as discussed above.

[24] It may be that copies of documents are provided by a bank under the authority of a BBEA order, and such documents cannot be proven under ss 4 and 5 of the BBEA. In such a situation, by reason of banking secrecy and by reason of the implied undertaking, the party who procured said documents would not be permitted to adduce the same pursuant to EA. If the documents are not copies of entries in banker's books within the definition of a 'banker's book' under s 2 of the BBEA, then the said party should not have those documents at all. The bank was not permitted to release those documents in

the first place as no court could have validly made such an order under the BBEA in any event. Any other documents would have been given by the bank only for the purposes of BBEA and nothing more. Attempting to rely on these documents under the EA would be in breach of the implied undertaking, and an abuse of process of BBEA procedure. A court is not permitted to countenance such breaches of the law.

[25] On the other hand and in reply, the plaintiff submitted that argument that the legislative intent of BBEA, the provisions of the Act do not provide a party with an independent right of discovery is unsustainable. The plaintiff contended that the provisions of BBEA only provides a mechanism in which a document already obtained pursuant to a discovery application under O 24 r 7A of the ROC may be proved at trial.

[26] Section 3 of the BBEA provides for copies of any entry in a banker's books to be admissible without the need for the original to be produced. The copy of the entries are only admissible should the requirements of the provision in ss 4 and 5 of the BBEA be complied with. Section 4 of the BBEA provides that an officer of the bank must either provide oral testimony or depose in an affidavit stating that the book was one of the ordinary books of the bank, the entry was made in the usual and ordinary course of business and that book is in the custody or control of the bank.

[27] Section 5 of the BBEA provides a copy of the entry in the banker's book must be examined with the original and confirmed as correct by any person who has examined the copy and compared it with the original. Section 6 of the BBEA provides that an officer of the bank shall not in any legal proceedings to which a bank is not a party be compellable to produce any banker's books or to appear as a witness to prove the matters set out therein when the contents of which can be proved under the provisions of the Act. Section 6 of the BBEA therefore relieved the bank from the obligation to produce any banker's book pursuant to a subpoena duces tecum where the same can be admitted and proved pursuant to the provisions of the Act. Section 7 of the BBEA then provides that on the application of any party to a matter, the court may order that such party be at liberty to inspect and take copies of any entries in a banker's books for any of the purposes of such proceedings.

[28] Therefore, an appreciation of the provisions of BBEA and the legislative intent behind it reveals that although the Act is concerned to make the proof at trial of banking transactions easier, and therefore it amends the substantive law of evidence, it also has an impact on the law and practice of disclosure, by enabling orders to be made for pre-trial disclosure of documentary evidence in the hands of non-parties (ie banks) relating to accounts held by the parties to the litigation and indeed sometimes by non-parties as well.

[29] This is apparent non other in the clear provisions of s 7 of the BBEA itself which grant the court with the power to order a party on application to inspect and take copies of any entries in a banker's book for purposes of the proceedings. The Act does not mandate that a prior discovery application is a pre-requisite to the grant of an order under the BBEA.

[30] The BBEA is an example of legislation in which Parliament has seen it fit to legislate to compel certain categories of persons who are not parties to legal proceedings to disclose documents in relation to matters relevant to the issues for adjudication in such legal proceedings. An application under the BBEA is therefore confined to disclosure of banking documentation within the ambit of the Act thus relieving the relevant bank officers from being summoned to court under a subpoena *duces tecum*. On the other hand, if disclosure is sought against a third party who is not a bank, then such application must be made under O 24 r 7A of the ROC as such parties do not fall within the special category of persons that parliament has seen it fit to enact legislation governing the production of documents

[31] Granted that the authorities provide that the provisions of the BBEA do not create any new power of discovery and the normal rules governing discovery of documents still apply. This simply means that notwithstanding the provisions of BBEA, the general principles governing disclosure in that the documents are in existence, are in the possession, custody or power of the relevant banks and most importantly are relevant to the issues to be adjudicated, must be satisfied.

[32] The same principles would govern any procedure for the production of documents from a party. For example, the issuance of a subpoena *duces tecum* can be objected on the grounds that the witness does not have custody of the documents, the description of the documents was not sufficiently specific, the documents sought are not relevant to the facts in issue in the litigation and that the request for documents amounts to a fishing expedition. To contend that an applicant under the provisions of the BBEA would need first to obtain an order under the discovery provisions pursuant to the Rules of Court 2012 with respect represents a fantastical leap of logic.

THE FINANCIAL SERVICES ACT 203 (ACT 758)

[33] To begin with, s 2 of the BBEA defines 'bank' and 'banker' mean any company carrying on the business of banking in Malaysia incorporated by or under any written law in force in Malaysia and any company carrying on such business in Malaysia under a licence granted under any written law in force in Malaysia relating to banking.

[34] Banking secrecy in Malaysia is governed by the Financial Services Act 2013 (Act 758) ('the FSA') which replaced the Banking and Financial Institutions Act 1989 ('the BAFIA'). The secrecy of information under the FSA is provided under s 133, which compliance to the provision is a mandatory. Any person who contravenes s 133 commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million ringgit or to both.

[35] Section 2 of the FSA defines 'book' as having the same meaning assigned to it in sub-s 4(1) of the Companies Act 1965 (Act 125). The Act 125 has been repealed and replaced by Companies Act 2016 (Act 777). Section 2 of Act 777 defines 'book' includes any register or other record of information and any accounts or accounting records, however compiled, recorded or stored, and also includes any documents. We did not find any striking different the definition of 'banker's book' under the BBEA and also definition under the FSA which adopts the definition of 'book' under Act 777.

[36] Section 133(1) of the FSA, imposes a mandatory duty on any financial institution or any person who is or has been a director, officer or agent of the financial institution from disclosing to another person any document or information relating to the affairs or account of any customer of the financial institution. However, disclosure of any document or information relating to the affairs or account of any customer of a financial institution can be disclosed to the bank, any officer of the bank or any person appointed under this Act or the Central Bank of Malaysia Act 2009 for the purposes of exercising any powers or functions of the bank under this Act or the Central Bank of Malaysia Act 2009 in the manner as sets out in sub-s (2).

[37] Section 134(1) of the FSA permits disclosure of documents or information for the for such purpose or in such circumstances as set out in the first column of Schedule 11, any document or information relating to the affairs or account of its customer to such persons specified in the second column of that Schedule or relating to the affairs or account of its customer to any person where such disclosure is approved in writing by the bank. Sub-section (4) prohibits any person who receives any document or information relating to the affairs or account of a customer as permitted under sub-s (1) not to disclose such document or information to any other person.

[38] It is noted that where any document or information is likely to be disclosed in relation to a customer's account, the court may, on its own motion, or on the application of a party to the proceedings or the customer to which the document or information relates order that the proceedings be held in camera and in such case, the document or information shall be secret as between the court and the parties thereto, and no such party shall disclose such document

or information to any other person and make such further orders as it may consider necessary to ensure the confidentiality of the customer information. Any person who fails to comply with conditions imposed by the bank commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million ringgit or to both.

[39] Section 145 of the FSA provides that the secrecy requirements shall not apply for the purposes of the exercise of any of its powers or the performance of any of its functions by the bank under this Act or the Central Bank of Malaysia Act 2009 or for the purposes of prosecuting any person for any offence under any written law. Notably, in this appeal the documents sought is not for the purposes mentioned in s 145 of the FSA.

[40] The persons who may apply for disclosure of bank documents under the FSA are a party to the proceedings or the customer to which the document or information relates. The secrecy of the documents however, must be maintained where it provides that the court may order that the proceedings be held in camera and no such party shall disclose such document or information to any other person and make such further orders as it may consider necessary to ensure the confidentiality of the customer information. Clearly, strict banking secrecy is important to maintaining the confidence of customers in Malaysian banking system.

THE BANKERS' BOOKS (EVIDENCE) ACT 1949 [ACT 33]

[41] Section 2 of the BBEA defines banker's book includes any ledger, day book, cash book, account book and any other book used in the ordinary business of a bank; includes any ledger, day book, cash book, account book and any other book used in the ordinary business of a bank. The definition in our view is very wide because of the word 'includes'. Therefore, in reference to bank, in our view it may include any register or other record of information and any accounts or accounting records, however compiled, recorded or stored, including any documents under the definition 'book' in s 2 of the FSA which adopts the definition under sub-s 4(1) of the Companies Act 1965 (Act 125) as alluded to earlier. The Act 125 has been repealed and replaced by Companies Act 2016 (Act 777).

[42] As provided in s 3 of the BBEA, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry and of the matters, transactions and accounts therein recorded but subject to the Act, which in our view governing the law of evidence relating to bankers' book. It follows by s 4 that a copy of an entry in a banker's book shall not be received in evidence if it fails to prove that the book was, at the time of the making of the entry, one of the ordinary books of the bank, the entry was made

in the usual and ordinary course of business and the book is in the custody or control of the bank. Such proof may be given by an officer of the bank, and may be given orally or by an affidavit sworn before any magistrate or person authorised to take affidavits.

[43] In s 5 of the BBEA, a copy of an entry in a banker's book shall not be received in evidence under this Act unless it is further proved that the copy has been examined with the original entry and is correct. Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any magistrate or person authorised to take affidavits. This section requires that the person who verified the copy against the original entry to prove, by either oral or affidavit evidence, that the copy has been examined with the original entry and is correct as a pre-condition to such copy being admitted as evidence.

[44] Section 6 of the BBEA, states that an officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a judge made for special cause.

[45] Section 7 of the BBEA, provides that on the application of any party to a legal proceeding the court or a judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings and an order under this section may be made either on or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed unless the court or judge otherwise directs.

THE EVIDENCE ACT 1950

[46] Section 34 of the EA provides that entries in books of accounts regularly kept in the course of business are relevant whenever they refer to a matter into which the court has to inquire, but the entries shall not alone be sufficient evidence to charge any person with liability. The illustration states that A sues B for RM1,000 and shows entries in his account-books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient without other evidence to prove the debt.

[47] The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. This is provided under s 103 of the EA.

[48] In s 130(3) of the EA provides that no bank shall be compelled to produce its books in any legal proceeding to which it is not a party, except as provided by the law of evidence relating to banker's books.

THE RULES OF COURT 2012

[49] Order 24 of the ROC, governs the procedure for discovery of documents. O 24 r 3 of the ROC provides that subject to the provisions of this rule and of rr 4 and 8, the court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party. In the instance case, the bank which is not a party to the legal proceedings was required to produce the documents. In that circumstances, application for discovery must be made under O 24 r 7A of the ROC.

[50] Order 24 r 7A of the ROC provides as follows:

7A Discovery against other person (O 24 r 7A)

(1) An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.

(2) An application after the commencement of proceedings for an order for the discovery of documents by a person who is not a party to the proceedings shall be made by a notice of application, which shall be served on that person personally and on every party to the proceedings.

(3) An originating summons under paragraph (1) or a notice of application under paragraph (2) shall be supported by an affidavit which shall —

(a) in the case of an originating summons under paragraph (1), state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court; and

(b) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings or the identity of the likely parties to the proceedings, or both, and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

(4) A copy of the supporting affidavit shall be served with the originating summons or the notice of application on every person on whom the originating summons or the notice of application is required to be served.

(5) An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the Court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the Court thinks it just to make such an order, and on such terms as it thinks just.

(6) An order for the discovery of documents may —

(a) be made conditional on the applicant giving security for the costs of the person against whom it is made or on such other terms, if any, as the Court thinks just; and

(b) require the person against whom the order is made to make an affidavit stating whether the documents specified or described in the order are, or at any time have been, in his possession, custody or power and, if not then in his possession, custody or power, when he parted with them and what has become of them.

(7) A person shall not be compelled by such an order to produce any document which he could not be compelled to produce —

(a) in the case of an originating summons under paragraph (1), if the subsequent proceedings had already been commenced; or

(b) in the case of a notice of application under paragraph (2), if he had been served with a subpoena to produce documents at the trial.

(8) For the purposes of rules 10 and 11, an application for an order under this rule shall be treated as a cause or matter between the applicant and the person against whom the order is sought.

(9) Unless the Court orders otherwise, where an application is made in accordance with this rule for an order, the person against whom the order is sought shall be entitled to his costs of the application, and of complying with any order made thereon on an indemnity basis.

[51] There are two modes of application for different stage of proceeding. Application is by way of originating summons if it is for an order for the discovery of documents before the commencement of proceedings or by notice of application after the commencement of proceedings for an order for the discovery of documents by a person who is not a party to the proceedings.

[52] An originating summons or a notice of application shall be supported by an affidavit which shall in the case of an originating summons, state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely

to be party to subsequent proceedings in court and in any case, specify or describe the documents in respect of which the order is sought. It is to be noted that an order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the court thinks it just to make such an order, and on such terms as it thinks just.

[53] A copy of the supporting affidavit shall be served with the originating summons or the notice of application on every person on whom the originating summons or the notice of application is required to be served.

[54] A person shall not be compelled by such an order to produce any document which he could not be compelled to produce in the case of an originating summons, if the subsequent proceedings had already been commenced or in the case of a notice of application, if he had been served with a subpoena to produce documents at the trial.

THE PURPOSE OF THE BBEA

[55] The BBEA is modelled on the English Bankers Books Evidence Act 1879 ('the English BBEA'). The definition of 'bankers' books' in the English BBEA, as originally enacted, was as follows:

> 'bankers' books' include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank

[56] In 1982, the English Parliament introduced an amendment to the English BBEA to broaden the definition of 'bankers' books' vide the Banking Act 1979. The definition, as it now stands, is as follows:

> 'bankers' books' include ledgers, day books, cash books, account books and other records used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism

[57] The English BBEA was originally enacted in 1876. In moving the bill for the English BBEA on 17 July 1876, Lord Aberdare explained that the object of the English BBEA was to facilitate the proving of banking transactions in legal proceedings.

> LORD ABERDARE, in moving that the Bill be now read the second time, said, its object was to facilitate the proof of transactions, according to bankers' ledgers and account books in legal proceedings.

(see: *Idiots' Asylum v Handysides* (1906) 22 TLR 573 and *Barker v Wilson* [1980] 2 All ER 81).

[58] The object of the English BBEA was subsequently acknowledged and explained by Cotton LJ in *Arnott v Hayes* (1887) 36 ChD 731 at p 737:

> The main object of the section is to enable evidence to be given at the trial. I do not say that it cannot be used for any other purpose; but in the present case the object sought is to obtain evidence for the trial. If any attempt were made to use the information thus obtained for purposes other than those of the action the Court would interfere. Now, what is the object of this Act? It takes away the power of summoning a banker to produce his books at the trial. So far it is an act for the relief of bankers — it relieves them from the great inconvenience of having to attend at the trial and bring with them books which are in daily use in their business. Then it enables copies of the entries to be given in evidence. How can the suitor know what entries are wanted? Only by examination of the books, and though this order gives a wider power of inspection than a suitor had before, it is an inspection for the very purpose of the Act. It was urged, and I was at first struck by the observation, that this is making the Act give a power of discovery. But that is a fallacy. This is not giving the Plaintiff discovery from the Defendant to assist the Plaintiff's case, but giving him a power of examination for the purpose of ascertaining what copies he will require for the purpose of being put in evidence.

[59] Though Cotton LJ observed above that the plaintiff would have a 'power of examination for the purpose of ascertaining what copies he will require for the purpose of being put in evidence', this has to be understood in the context of the legislation before the court. In this context, the emphasis that it was directed at relieving bankers from the inconvenience of attending court takes on significance. Thus, it is apparent that the English statute was aimed at putting in place an alternative framework for the admitting of bankers' evidence. It was not aimed at providing a means of discovery.

[60] The said intention was definitively recognised by the Privy Council in *Douglas and Others v Pindling* [1996] 3 LRC 460, an appeal which concerned the Bahamas Bankers' Books Evidence Act (Cap 53). That legislation was 'in substantially identical terms to the' English BBEA. Lord Keith of Kinkel said, at p 469:

> The purpose of ss 3, 4, 5 and 6 was to enable attested copies of entries in a banker's books to be made available in evidence without the necessity of the books themselves being produced in court together with an officer of the bank to speak to them. In relation to the United Kingdom Bankers' Books Evidence Act 1879, which is in substantially identical terms to the Bahamian Act, Lindley MR said in *Pollock v Garle* [1898] 1 Ch 1 at 4:
>
> > The Bankers' Books Evidence Acts were passed for the obvious purpose of getting over a difficulty and hardship as to the production of bankers' books. If such books contained anything which would be evidence for either of the

parties, the banker or his clerk had to produce them at the trial under a subpoena duces tecum, which was an intolerable inconvenience to bankers when the books were in daily use. The leading object of the Acts was to protect bankers from that inconvenience. This is accompanied by the first six sections of the Act of 1879, which enable bankers to send attested copies of entries in their books instead of producing the books.

[61] Section 7 of the BBEA mirrors the English BBEA. Put in summary, essentially, the bankers' books provisions set out to achieve three purposes as follows:

(a) to enable bankers' books to be inspected despite the duty of confidentiality;

(b) to relieve bankers of the onerous need to produce these books in court; and

(c) to provide that authenticated copies of such books be received as prima facie evidence.

(see: *Wheatley v Commissioner of Police of the British Virgin Islands* [2006] 1 WLR 1683).

[62] The second and third purposes are mainly to facilitate the production of bankers' books evidence. The general requirement is for documentary evidence admitted in civil proceedings to be accompanied by oral testimony. The bankers' books provisions were specially enacted for banks when it was thought that having a bank representative produce physical bank documents in court would be an intolerable inconvenience to a bank's day to day operations. For convenience, it would suffice for attested copies to be produced and that, a bank is not compellable to attend as witness to prove the matters recorded in its books without special cause. As such, the provisions have even been referred to as a 'privilege'. 'Legal proceedings' are defined in s 2 as civil or criminal proceeding or inquiry in which evidence is or may be given and includes an arbitration. It is noteworthy that s 7 of the English Bankers' Books Evidence Act, the equivalent of s 7 of the BBEA has developed into a form of discovery procedure on its own. To avoid s 7 becoming a backdoor attempt at obtaining evidence from a bank outside of the disclosure rules, early English decisions made clear that the usual disclosure considerations apply.

[63] It must be emphasised that the preamble of BBEA says that it is an Act to provide for the law of evidence relating to bankers' book. Generally, s 103 of the EA provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. This reinforces s 130 of the EA in so far as the underlying purpose of BBEA is

concerned ie to avoid the need for bankers to give formal evidence of banker's books entries. In other words, in the usual course, the EA applies to the proving of the contents of documents either by primary or by secondary evidence.

[64] The BBEA provides an exception to the general framework of the EA. Section 130(3) of the EA says that no bank shall be compelled to produce its books in any legal proceeding to which it is not a party, except as provided by the law of evidence relating to banker's books. Thus, it clearly reflects the underlying intention of the BBEA as acknowledged by Cotton LJ in Arnott. A banker is not to be summoned merely to produce bankers' books. This is reinforced by provisions of the BBEA itself. In other words, the law of evidence relating to banker's books is provided for under the specific framework put in place by the BBEA.

[65] It was submitted that the literal and ordinary meaning of the word 'book' would suggest that Parliament required a book in one form or the other ie a number of printed or written pages, bound together along one edge and usually protected by covers. This interpretation would exclude any non-book records. In fact, s 2 of the FSA defines 'book' as having the same meaning assigned to definition under the Act 777. Section 2 of Act 777 defines 'book' includes any register or other record of information and any accounts or accounting records, however compiled, recorded or stored, and also includes any documents.

[66] However, the definition is to be read in conjunction with s 90A of the EA, the application of which is preserved by s 90C of the EA. Section 90A(1) of the EA provides, inter alia, 'a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement'.

[67] This would allow for an updated interpretation of 'banker's book' to include documents produced by computers and statements contained therein. A 'computer' is defined in s 3 of the EA to mean:

> an electronic, magnetic, optical, electrochemical, or other data processing device, or a group of such interconnected or related devices, performing logical, arithmetic, storage and display functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device or group of such interconnected or related devices, but does not include an automated typewriter or typesetter, or a portable hand held calculator or other similar device which is non-programmable or which does not contain any data storage facility

A 'document' is defined under s 3 to mean:

> any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of —
>
> (a) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;
>
> (b) any visual recording (whether of still or moving images);
>
> (c) any sound recording, or any electronic magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever;
>
> (d) a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a), (b), or (c), or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter

[68] This according to the defendants does not however mean that a court is at liberty to include any such document under the BBEA. The document, even if it is a document or statement within the meaning of s 90A of the EA, must be a copy of an entry in a banker's book ie the mode utilised by a bank to permanently record transactions relating to the business of that institution. As wide as that scope may seem at first glance, 'document' must be construed *ejusdem generis* with 'ledger, day book, cash book and account book'. Thus, in *Williams v Williams; Tucker and others v Williams and another* [1987] 3 All ER 257, Sir John Donaldson MR said at p 261:

> Putting the matter in another way, 'other records' in the new definition has, I think, to be construed ejusdem generis with 'ledgers, day books, cash books [and] account books' and unsorted bundles of cheques and paying-in slips are not 'other records' within the meaning of the Act.

[69] Similarly, in *Re Howglen Ltd* [2001] 2 BCLC 695, Pumfrey J said, at p 701:

> I take this case as clear authority that the words 'other records' have to be construed to cover records of the same kind as ledgers, day books, cash books and account books, which are, as is well known, the means by which a bank records day-to-day financial transactions. The words are not, it seems to me, apt to cover records kept by the bank of conversations between employees of the bank, however senior, and customers. The records in the present case are essentially the records of meetings, and it seems to me that those sort of notes of meetings cannot be properly regarded as entries in books kept by the bank for the purpose of its ordinary business within the definition of s 9(2).

[70] Where the permanent record is a computer document, the admitting of that document under the BBEA must not only fulfil the requirements of ss 3–5, of the BBEA, it must also comply with the certification requirements under s 90A of the EA. This approach would negate any inconsistency between the BBEA and the EA. Any other reading would not only lead to a conflict between the two statutes, but also be repugnant to the BBEA and render it redundant. It must be borne in mind that a court is not at liberty to ignore the language of the BBEA, or its underlying purpose, to provide an updated interpretation of the definition of 'banker's book'. Such an exercise is permitted only to the extent the law allows. As explained above, s 90A of EA allows for that updating within the scope permitted by that provision.

[71] Given this context, the Malaysian courts must be cautious when applying the definition to current banking practice. The subjective views of a judge on what ought to be included as a 'banker's book' cannot prevail over the constraints placed by legislature on the exercise of power, and settled principles of statutory interpretation. The Malaysian courts have less latitude in that regard, and thus less able to approach the definition of 'banker's book' with the latitude of their English counterparts. For instance, in *Barker v Wilson* [1980] 2 All ER 81, the permanent record was kept by way of microfilm. Bridge LJ said, at p 83:

> The Bankers' Books Evidence Act 1879 was enacted with the practice of bankers in 1879 in mind. It must be construed in 1980 in relation to the practice of bankers as we now understand it. So construing the definition of 'bankers' books' and the phrase 'an entry in a banker's book', it seems to me that clearly both phrases are apt to include any form of permanent record kept by the bank of transactions relating to the bank's business, made by any of the methods which modern technology makes available, including, in particular, microfilm.

[72] While the rationale of the approach adopted by Bridge LJ is noteworthy, it cannot be adopted wholesale in the Malaysian context for the reasons set out above. Pertinently, the definition of 'banker's books' under the English BBEA was expanded by the 1982 amendment. It raises the question of why there was a need to do so given the judicial pronouncements that preceded it. Be that as it may, the point made above concerning the need to adhere to the definition in the context of the statute as a whole was underscored in *R v Dadson* (1983) 147 JP 509. Heilbron J said:

> Whilst the Bankers' Books Evidence Act enables evidence to be admissible in a court by the production of copies, rather than the originals, it does so provided only that the book, one of the types referred to in that section, is one of the ordinary books of the bank, and the entry was made in the ordinary course of banking business. It is therefore manifest that these letters could not be brought within the clearly expressed language of that Act. They are not 'bankers' books' and in the judgment of this Court they should not have been admitted. Furthermore, the emphatic

references to those letters in the summing-up, were in effect an invitation to the jury, if they were so minded, to rely upon them as material evidence to prove that the appellant knew that he was not allowed to have an overdraft, and so to infer that he falsely and dishonestly represented that he was authorized and entitled to use the cheque card when issuing the various cheques and in our judgment they were misdirection's, and the verdicts cannot stand.

[73] The Singapore courts appeared to have adopted a broader understanding of the definition under its banker's books framework. Care has to be exercised, however, in applying decisions from that jurisdiction, notably *Wee Soon Kim Anthony v UBS AG* [2003] 2 SLR 91; [2003] 2 SLR(R) 91, for the reasons set out above. Furthermore, the Singapore definition of 'banker's books' includes 'ledgers, day books, cash books, account books and all other books used in the ordinary business of the bank'. This definition is similar to that in s 2 of the BBEA save that the latter states 'any other book' instead of 'all other books'. The post-amendment definition in the English BBEA substituted, inter alia, 'all other books' with 'all other records'. This distinction was acknowledged by Chao Hick Tin JA, in para 31.

[74] Notwithstanding, the court applied a broader definition to include correspondence between the bank in question and the defendant (who had previously been ordered to grant discovery of the same documents but had failed to do so). Chao Hick Tin JA justified this on the basis that correspondence which recorded a transaction between a bank and a customer formed an integral part of the account of that customer. He said, at pp 100–101:

> [36] In any event, we are of the opinion that in interpreting the expression 'other books' in the definition we should take a purposive approach and recognise the changes effected in the practices of bankers. Any form of permanent record maintained by a bank in relation to the transactions of a customer should be viewed as falling within the scope of that expression. Correspondence between a bank and a customer which records a transaction clearly formed an integral part of the account of that customer and there is no good reason why it should be excluded. Otherwise, the object behind the enactment of Part IV of the Act would be undermined and banks would be troubled to have to come to court with the documents, including correspondence, relating to the account(s) of each customer. Thus, we agree with the approach taken in *Williams v Williams*. However, such records should be contrasted with notes taken by bank officers of meetings with customers and such notes cannot be regarded as entries in books kept by the bank for the purpose of its ordinary business within the meaning of 'bankers' books' (*Re Howglen Ltd* [2001] 1 All ER 376).

[75] Be that as it may in the presence case, it was contended that the plaintiff did not identify any of the documents sought as being 'banker's book' within the meaning of s 2 of the BBEA and neither the learned judge had specifically

identified which of the disputed documents were or were not 'banker's books' (disputed documents referred to documents purportedly obtained under BBEA Order 1 and documents purportedly obtained under BBEA Order 2). In our view this would prejudice the Defendants and it is fatal.

[76] The words 'a copy of any entry in a banker's book' are found in ss 3–5 of the BBEA which is very significant. The word 'entry' is not given a specific definition in BBEA. However, the wording of s 3 suggests that an 'entry' in a banker's book refers to 'the matters, transactions and accounts therein recorded' in the banker's book. In *Williams v Williams; Tucker and others v Williams and another* [1987] 3 All ER 257, Sir John Donaldson MR said, at p 259:

> The first Bankers' Books Evidence Act was enacted in 1876. Its purpose was set out in the preamble:
>
> > WHEREAS serious inconvenience has been occasioned to bankers and also to the public by reason of the ledgers and other account books having been removed from the banks for the purpose of being produced in legal proceedings: And whereas it is expedient to facilitate the proof of the transactions recorded in such ledgers and account books: Be it therefore enacted [etc].
>
> The way this was achieved was by providing that entries in the bank's books should be admissible as prima facie evidence of the 'matters, transactions, and accounts recorded therein', subject to verification by the bank's officers and that copies of all such entries should be admissible in evidence without production of the originals.

[77] On the relevancy of entries in a book account, we noted s 34 of the EA provides that entries in books of accounts regularly kept in the course of business are relevant whenever they refer to a matter in which the court has to inquire, but the entries shall not alone be sufficient evidence to charge any person with liability. This section contemplates two conditions of admissibility. Lord President, Salleh Abas (as he was then) in *Sim Siok Eng & Anor v Poh Hua Transport And Contractor Sdn Bhd* [1980] 2 MLJ 72 at p 73 (FC) held as follows:

> The fundamental principle underlying this section is a compromise between total rejection and partial acceptance of a doctrine that 'a man cannot make evidence for himself'. Thus maxim springs from the desire to safeguard the law against false evidence being used, but the safeguard may be too extreme because unless modified it prevents a party from using entries recorded by itself in a subsequent trial. Thus a compromise is reached between the necessity of evidence and circumstantial guarantee of its truthfullness. Such guarantees are reflected in the following two conditions of admissibility enacted in section 34 ie,
>
> (1) The entries are in a book of account regularly kept in the course of bussiness; and
>
> (2) The entries therein refer to a matter into which the court has to inquire.

[78] Failure to prove the conditions of admissibility would render the book of accounts inadmissible. See also *Syarikat Jengka Sdn Bhd v Abdul Rashid bin Harun* [1981] 1 MLJ 201 at p 203 (FC). Proof of the condition that entries refer to a matter onto which the court has to inquire would generally pose no problem. What is of concern is proof that the entry is in a book of accounts regularly kept in the course of bussines. Under the section the entries shall not alone be sufficient evidence to charge any person with liability. There must be independent evidence of the transaction to which the entries relates. The entries themselves would have had to be proved by someone having personal knowledge of the transactions reflected in such entries (see: Edgar Joseph Jr J (as he then was) in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 at p 369 (HC) and corroboration may be provided by the book of accounts itself. There must be other evidence to corroborate the truthfullness of these entries (see: *Sim Siok Eng & Anor v Poh Hua Transport & Contractor Sdn Bhd*).

[79] Based on the above observations, it is our view that a copy of any entry in a banker's book be received as prima facie evidence of such entry and of the matters, transactions and accounts therein recorded must be subject to compliance of ss 4–5 of the BBEA. A bank is not compellable to attend as witness to prove the matters recorded in its books. For convenience, it would suffice for attested copies to be produced. This is an exception stated in s 130(3) of the EA. Though it would appear that s 7 of the BBEA empowers a court to enable discovery, closer consideration of the provision in the context of the statute as a whole would show that this is not the case.

[80] In our view, the plaintiff's applications in encls 307 and 395 were specific discovery for documents which must adhere to the existence of a specific legal framework for discovery under the ROC. The ROC is an exhaustive code providing no room for the exercise of any common law principles of discovery. The bank and the defendants are non party to the discovery for the banks' book. In the case where the third party is involved, the plaintiff must apply for discovery under O 24 r 7A of the ROC. If the application is made after the commencement of action, the application is moved under O 24 r 7A(1). The BBEA is only intended to facilitate the proving of copies of entries in banker's books, therefore, the right to discovery is an essential pre-requisite to the making of an order. Section 7 of the BBEA has to be understood in the context of s 130(3) of the EA and s 6 of the BBEA, as well as provisions of law concerning banking secrecy. The underlying purpose of BBEA is concerned is to avoid the need for bankers to give formal evidence of banker's books entries.

[81] In another context, although provisions in BBEA have been used for asset-tracing exercises, they are generally underutilised, and there is limited

English law interpreting them. Notwithstanding that, some broad parameters (mainly from the discovery rules) circumscribe the scope of relief: First, the documents sought must be material to the proceedings. A court will not entertain a fishing expedition, and if the relevance of documents is unclear. Second, third parties should not be prejudiced here, typically a bank or a customer. Further, because the rules of discovery apply to applications for bankers' books, in *Bhimji and Others v Chatwani and Others (No 2)* [1992] 1 WLR 1158, it was held that by parity of reasoning' documents disclosed under bankers' books provisions are subject to the usual implied undertaking that documents obtained are not to be used for purposes outside of the litigation. The courts take it so seriously that a person may be cited for contempt if an undertaking made to it is breached. For clarification purposes say a litigant, to whom documents are produced, undertakes to the court not to use such documents for any other purpose other than those of the proceedings in which they are disclosed, subsequently contravenes that undertaking, the party who acts in breach of the undertaking should be prepared to face the wrath of the court. These appear to be the key applicable principles.

[82] Civil fraud is no respecter of persons. 'Fraud' is a protean term and covers broad shades of conduct. It ranges from dishonest acts arising from a contractual relationship, corruption in public office, breach of expres trust, and the more straightforward but no less sophisticated 'boiler room' fraud. It appears that the only means to obtain pre-action 'discovery against a bank in this country is via the bankers' books provisions in the EA. The principles governing pre-action discovery and the policy considerations emerging from the case law, may assist in the development of bankers' books jurisprudence. At the outset, the term 'disclosure' is used in English law to describe the process by which a party to proceedings discloses relevant documentary evidence, while the term 'discovery' is the term used in third country broadly to describe the same process.

[83] *Norwich Pharmacal* relief is a valuable remedy which has been adapted and developed through jurisprudence over the years. As Lord Woolf pointed out in the English case of *Ashworth Hospital Authority v MGN Ltd* [2002] 4 All ER 193 'the limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a flexible and mature remedy'.

[84] In *Norwich Pharmacal Co and Others v Customs and Excise Commissioners* [1974] AC 133, the plaintiffs sought discovery from the defendants of documents received by them innocently in the exercise of their statutory functions. They sought to identify people who had been importing drugs unlawfully manufactured in breach of their patents. The court held, if someone, even innocently became involved in tortious acts committed by third parties, he became under a duty assist in discovery of the identity of the third

party wrongdoers. How the information was acquired was not relevant. Duties of confidence owed by taxation authorities could be overborne if necessary.

[85] In *Bankers Trust Co v Shapira and Others* [1980] 1 WLR 1274, two forged cheques, each for USD500,000, had been presented by two men and as a result USD1m had been transferred to accounts in their names. The plaintiff sought to trace assets through the banks involved. It was held as follows:

> The court approved the use of Norwich Pharmacol procedures in actions where those who have been deprived of property have sought to obtain from banks and others information to enable them to trace the assets. The bank, though involved through no fault of their own in the wrongful acts of others, came 'under a duty to assist (the plaintiffs) by giving them and the court full information and disclosing the identity of the wrongdoers', with an important caveat that: 'This new jurisdiction must of course be carefully exercised. It is a strong thing to order a bank to disclose the state of its customers account and the documents and correspondence relating to it'. However the court would, if necessary, make a more wide-ranging order.

[86] The House of Lords' decision in *Norwich Pharmacal Co v Customs and Excise Commissioners*, may provide relief to the plaintiff seeking documents and information from an independent third party to enable him to bring his claim. The determinative question in any application for *Norwich Pharmacal* relief is whether justice requires the requested disclosure to be ordered. The *Bankers Trust* order is a variation of the *Norwich Pharmacal* order and may be used to assist in tracing assets. It is an order which requires parties who are not defendants to the substantive action to make full disclosure of facts which would enable funds described as the property of the plaintiff to be located and protected from dissipation before the action. Again, it is possible to make such orders on a without notice basis and subject to gagging orders.

[87] *Norwich Pharmacal*'s case was followed by the Supreme Court in *First Malaysia Finance Bhd v Dato' Mohd Fathi bin Haji Ahmad* [1993] 2 MLJ 497 where Edger Joseph Jr held as follows:

> The general rule as laid down in *Norwich Pharmacal Co v Customs and Excise Commissioners* 2 is that discovery to find the identity of the wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. To this general rule, there is an exception that if, through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, whilst he may incur no personal liability, yet he is under a legal duty to assist the person who had been wronged by giving him full information and in making disclosure of the identity of the wrongdoers.

[88] A *Bankers Trust* order should not be confused with *Norwich Pharmacal* relief. Whilst there is some overlap between the two, the two remain distinct

from one another. *Norwich Pharmacal* relief is geared towards discovery to identify wrongdoers or evidence of wrongdoing whereas a *Bankers Trust* order might be said to be aimed more specifically at protecting a party's proprietary interest in a claim.

DISCOVERY V INSPECTION

[89] It is not disputed that the plaintiff's application was made prior to the commencement of action, then the application must be made under O 24 r 7A(1) of the ROC. In our view, as it is intended to facilitate the proving of copies of entries in banker's books, the BBEA can only be invoked if a bank officer must prove by either oral or affidavit evidence that the book was, at the time of the making of the entry the entry was made in the usual and ordinary course of business and the book is in the custody or control of the bank. The right to discovery is therefore, an essential pre-requisite to the making of an order. Section 7 of the BBEA has to be understood in the context of s 130(3) of the EA and s 6 of the BBEA, as well as provisions of law concerning banking secrecy. This provision enables a party to any legal proceedings to apply ex parte for an order to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.

[90] The term 'discovery' and 'inspection' involves different process and the application is for different purpose. Discovery and inspection of documents are two different concepts. These two concepts are respectively defined in *Black's Law Dictionary* as follows:

(a) discovery is defined as 'Compulsory disclosure, at a party's request, of information that relates to the litigation'; and

(b) inspection is defined as 'A careful examination of something, such as goods (to determine their fitness for purchase) or items produced in response to a discovery request (to determine their relevance to a lawsuit)'.

[91] The difference is also indicated by the respective provisions in the ROC.

Discovery

(a) O 24 r 3(1)ROC empowers the court to order any party to the proceedings to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power ('the List'). The form of the List shall be in Form 38.

(b) O 24 r 7(1) of the ROC provides that any party to the proceedings may apply to court for an order of discovery against any other party.

(c) As against a non-party:

(i) O 24 r 7A(1) of the ROC provides that an application for discovery could be made before the commencement of proceedings by way of an originating summons; and

(ii) O 24 r 7A(2) of the ROC provides that an application for discovery could be made after the commencement of proceedings by way of a notice of application.

Inspection

(d) O 24 r 9 of the ROC provides that a party who is agreeable to disclose any documents in the List served on him shall allow for the inspection and taking of copies of the said documents by serving a notice in Form 40.

(e) O 24 r 10(1) of the ROC provides that a party who had made reference to any documents in his pleadings or affidavits shall allow for the inspection and taking of copies of the said documents upon receiving a request in Form 41.

(f) O 24 r 11(1) of the ROC empowers the court to make an order in Form 43 for the inspection and taking of copies of documents in any of the following event:

(i) where a party fails to offer inspection under O 24 r 9 or r 10 of the ROC;

(ii) where a party objects to the production of any document for inspection; or

(iii) where a party offers inspection at an unreasonable time or place.

[92] In this context, we referred to the Hong Kong Court of Appeal in *Shun Kai Finance Co Ltd & Ors v Japan Leasing (HK) LTD (in liq) (No 2)* [2001] 1 HKC 636. Citing with approval the decision of Hobhouse J in *Eagle Star Insurance Co Ltd v Arab Bank plc* (English High Court, 25 February 1991, unreported), Le Pichon JA stated obiter, at p 641:

Hobhouse J further pointed out that although sometimes referred to as an exercise

of discovery and r 10 (similar to Order 24 rule 10, ROC) appears in the Order entitled 'Discovery and Inspection of Documents' —

... *it is not, in essence, a discovery exercise. Its history is different, its function is different*.

[93] Coming back to BBEA, prior decisions of the High Court have made it clear that the BBEA is not intended to give power of discovery to the High Court. Thus, in *Goh Hooi Yin v Lim Teong Ghee & Ors* [1977] 2 MLJ 26, citing Arnott with approval, Arulanandom J said, at p 28:

> Section 7(1) of the Bankers' Books (Evidence) Act, 1949 is in pari materia to the English Act. The main object of the provisions of the Act is to enable evidence to be procured and given and to relieve bankers from the necessity of attending and producing their books. They do not give any new power of discovery or alter the principles of law or the practice with regard to discovery.
>
> In *Parnell (formerly O'Shea) v Wood & Anor* (1892) 17 PD p 137, the Court of Appeal in upholding the trial judge's refusal to allow inspection of pass books of a party had this said by Kay LJ:
>
> > It is necessary to proceed with caution in acting on s 7 of the Bankers' Books Evidence Act, as was observed by Bowen LJ, in *Arnott v Hayes*. According to the appellants, if a person engaged in litigation has a banking account, his adversary is entitled to inspect that account to see whether he can find anything that will help him. The Bankers' Books Evidence Act has nothing to do with any question of the kind. Section 7 of the Act gives a certain power of inspecting bankers' books if the judge thinks fit to order it, but to suppose that it meant to authorise a roving inspection of them is absurd. The main object of the Act was this: before the Act the only way of making bankers' books evidence was to have them produced at the trial, and to examine the clerk who kept them. Bowen LJ, in *Arnott v Hayes*, has pointed out the course of proceeding. The books which were wanted were generally books which were in daily use, and the statute was mainly passed for the purpose of relieving bankers from this inconvenience by allowing them to make copies and verify them. The Act does indeed provide by section 7 for allowing inspection where a judge thinks proper to order it, but a case must be made shewing that such inspection is proper. I never saw a more extraordinary application than the present. Pass books are produced which are no doubt copied from the banker's books, but the party producing them seals up parts which she swears not to be relevant. According to the law of discovery, the opposite party has no right to look at the parts so sealed up. The present application is an attempt to get behind the affidavit of the party producing the documents. There is nothing to shew that the affidavit is untrue, but the applicants wish to evade it by obtaining inspection of the books from which the pass books were made out.

[94] Similarly, in *Pean Kar Fu v Malayan Banking Bhd (Toh Boon Pin, intervener)* [2004] 5 MLJ 519, Jeffrey Tan J (as he then was) said, at p 525:

> 9 ... As said, s 7 is to enable parties, who would otherwise not be able to do so, to inspect the books of the bank and take copies of them. Section 7 is to assist

discovery. Section 7 has not altered the principles of law or practice with regard to discovery which is the pre-trial device to obtain facts and information about the case from the other party in order to assist the party's preparation for trial. Section 7 empowers the court to order the inspection and the taking of copies of entries in a banker's book, in the pre-trial discovery process. But that is not to say that s 7 has brought about a right to bring a separate action against a bank to reveal its book entries, and or to take the discovery process away from the court before whom the legal proceeding is being held or taken. Section 7 has not provided an alternative method of discovery. Discovery remains in the domain of the trial court. This application for a s 7 order should have been made to the trial court.

[95] The learned judge in this case concluded that s 7 of the BBEA provided the plaintiff a free-standing right to discovery. He further concluded that 'This construction is supported by the plain words of s 7, which in no uncertain terms provide for the right to inspect banker's books and to take copies of entries in such books'. In our view, the submission of the Defendant is correct that the strictly literal interpretation of s 7 of the BBEA by the learned judge was erroneous for it having the effect of disregarding the underlying legislative intent of the BBEA and rendering the other provisions in the BBEA repugnant. It also ignored other relevant legislation, in particular the FSA.

[96] As alluded to earlier the duty of banking secrecy is statutorily imposed by s 133(1) of the FSA. Section 134 read with Schedule 11 of the FSA however provides for certain permissible disclosures, including 'compliance with a court order made by a court not lower than a Sessions Court'. An order made under the BBEA would, as a matter of course, be such a court order. In *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, Bankes LJ said, at pp 472–473:

In my opinion it is necessary in a case like the present to direct the jury what are the limits, and what are the qualifications of the contractual duty of secrecy implied in the relation of banker and customer. There appears to be no authority on the point. On principle I think that the qualifications can be classified under four heads: (a) Where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer. An instance of the first class is the duty to obey an order under the Bankers' Books Evidence Act.

[97] It is trite that the court ought to adopt an interpretation that avoids absurdity and injustice. In *Panglima Tentera Laut Diraja Malaysia & Ors v Simathari a/l Somenaidu* [2017] 2 MLJ 14, Zaharah Ibrahim FCJ (as she then was) said, at pp 28–29:

[58] *To interpret s 217(2) of the Armed Forces Act in a strictly literal manner in the circumstances of this case would certainly lead to the absurd consequence* that a Naval serviceman, for want of regulations made under s 16 of the Ordinance or s 36 of the Armed Forces Act, could not, at the material time, be terminated from service

except in pursuance of a sentence by a court-martial. *That could not have been intended by Parliament.*

[59] How then should the court interpret s 217(2) of the Armed Forces Act?

[60] The following words of Donaldson J in *Corocraft Ltd and another v Pan American Airways Inc* [1968] 2 All ER 1059 are quoted in *Bennion on Statutory Interpretation*, (5th Ed) at p 502:

> The duty of the courts is to ascertain and give effect to the will of Parliament as expressed in its enactments. *In the performance of this duty the judges do not act as computers into which are fed the statute and the rules for the construction of statutes and from whom issues forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges, as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing.*

[61] Romer LJ in *Swan v Pure Ice Company, Limited* [1935] 2 KB 265 quoted the following passage from *Maxwell on the Interpretation of Statutes* (7th Ed), p 217:

> They (ie, the authorities) would seem rather to establish that the judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from the injustice, inconvenience, or absurdity of the consequences to which it would lead, that the language thus treated does not really express the intention and that his amendment probably does.

[62] In *Tetuan Kumar Jaspal Quah & Aishah v Far Legion Sdn Bhd & Ors* [2007] 3 MLJ 305; [2007] 3 CLJ 230, Suriyadi Halim Omar JCA (as he then was), said:

> ... Maxwell in Interpretation of Statutes had occasion to quote the following passage from *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at p 1022:
>
> > ... Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words but where, in construing general words the meaning of which is not entirely plain there are adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction. At the same time, if the choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of the legislation we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an *effective result.* (Emphasis added.)

[63] We agree with the minority in the Court of Appeal that in the circumstances of this case, *the court must, as exhorted by s 17A of Act 388, give to s 217(2) of the Armed Forces Act a construction that would promote the underlying purpose of that subsection*: which is clearly to preserve the subsidiary legislation in force and applying to Navy

servicemen at the time of coming into force of that subsection until such time as the subsidiary legislation is replaced under the Armed Forces Act. A

(see also: *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590). B

[98] The legislative purpose of the BBEA is 'to make the proof at trial of banking transactions easier'. The issue is whether BBEA has an impact on the law and practice of disclosure, by enabling orders to be made for pre-trial disclosure of documentary evidence in the hands of non-parties (ie banks) relating to accounts held by the parties to the litigation and indeed sometimes by non-parties as well. We reiterated our stand that s 7 of the BBEA has to be understood in the context of its underlying legislative intention, and s 130(3) of the EA, as well as a banker's statutory duty to secrecy under the FSA. The BBEA, EA and the FSA ought to be considered as being in pari materia as submitted by the Defendants. C D

[99] The meaning of the phrase 'in pari materia' was extensively discussed in *Shah & Co v State of Maharashtra* 1967 AIR SC 1877, where Vaidialingam J said, at pp 1882– 1883: E

(21) We have been referred to certain passages in certain text books, as well as in certain decisions, to show, under what circumstances, statutes can be considered to be in pari materia, and the nature of the construction to be placed on such statutes. Sutherland, in 'Statutory Construction', 3rd Ed, Vol 2, at p 535, states: F

> *Statutes are considered to be in pari materia — to pertain to the same subject matter — when they relate to the same person or thing, or to the same class of persons or things, or have the same purpose or object.*

The learned author, further states, at p 537: G

> *To be in pari materia, statutes need not have been enacted simultaneously or refer to one another.*

Again, at p 544, it is stated:

> When the legislature enacts a provision, it has before it all the other provisions relating to the same subject matter which it enacts at that time, whether in the same statute or in a separate act. It is evident that it has in mind the provisions of a prior act to which it refers, whether it phrases the later act as an amendment or an independent act. Experience indicates that a legislature does not deliberately enact inconsistent provisions when it is cognizant of them both, without expressly recognizing the inconsistency. H I

The canon of construction, under these circumstances, is stated by the author, at p 531:

> *Prior statutes relating to the same subject matter are to be compared with the new*

A *provision; and if possible by reasonable construction, both are to be so construed that effect is given to every provision of each. Statutes in pari materia although in apparent conflict, are so far as reasonably possible construed to be in harmony with each other.*

In Craies, on 'Statute Law', 6th Edition, at p 133, it is stated:

B Where Acts of Parliament are in pari materia, that is to say, are so far related as to form a system or code, of legislation, the rule as laid down by the twelve, judges in *Palmer*'s Case [(1785) 1 Leach CC 4th Ed, 355], is that such Acts 'are to be taken together as forming one system, and as interpreting and enforcing each other'. In the American case of *United Society v Eagle Bank* [(1829) 7 Conn 457, C 470], Hosmer J said: 'Statutes are in pari materia which relate to the same person or thing or to the same class of persons or things ...'

In Maxwell on 'The Interpretation of Statutes', 11th Edition, at p 153, the principle is stated thus:

D An author must be supposed to be consistent with himself, and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the legislature is treated in the same manner as that of any other author, and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does E not in express terms modify or repeal ... It cannot be assumed that Parliament has given with one hand what it has taken away with the other.

F (see also: *Attorney-General v HRH Prince Ernest Augustus of Hanover* [1957] 1 All ER 49**,** *Bell ExpressVu Limited Partnership v Rex* [2002] 2 RCS 559, *Board of Trustees of the Port of Bombay v M/s Sriyanesh Knitters* AIR 1999 SC 2947).

CONCLUSION

G **[100]** Having regard to the matters stated above, our conclusion are as follows:

Enclosure 307

H We agreed with the defendants that the BBEA was created to merely facilitate the proving of banking transactions through the admission of bankers' evidence. It was, not intended to serve as an alternative means of discovery against bankers. The ordinary principles of discovery would not be applicable in an application under s 7 of the BBEA. This is underscored by the fact that I there is a specific legal framework for discovery in Malaysia, specifically O 24 of the ROC. Respectfully, the foregoing conclusions of the learned judge were therefore erroneous. The plaintiff ought to have first establish its right to discovery under the ROC. We also agreed with the defendants that the learned judge failed to specifically identify which of the disputed documents were or

were not 'banker's books' (disputed documents referred to documents purportedly obtained under BBEA Order 1 and documents purportedly obtained under BBEA Order 2. Documents such as company documents, memorandum or resolution for opening of bank account, memorandum or resolution for change of authorised signatory) are not 'banker's books' as they do not permanently record transactions in the ordinary business of a bank.

Miscellaneous internal documents used by the bank (such as specimen signature form, remittance application form, account opening application form, correspondence and documents evidencing the closing of account) are not 'banker's books' as they do not permanently record transactions in the ordinary business of a bank;

Cheques and paying-in slips (such as cheque deposit receipts, transaction slips are not 'banker's books' as they do not permanently record transactions in the ordinary business of a bank. They are either instructions (eg cheques) or documents evidencing the said instructions (paying-in slips) prepared merely for the purposes of customers' convenience.

Bank statements are not 'banker's books' as they are created not for the purpose of permanently recording transactions in the ordinary business of a bank, but for customer's reference only.

Enclosure 395

In respect of BBEA Order 1:

The plaintiff would not be permitted to adduce under the EA documents that were improperly disclosed. Those disputed documents should be excluded for being outside the scope of the BBEA for not being copies of entries in banker's books within the meaning of s 2. The plaintiff was required to prove and verify any of the disputed documents that fell within the permissible scope of the BBEA orders under ss 4 and 5 of the BBEA. Failing that, the plaintiff was not permitted to rely on the disputed documents on the strength of the EA.

In respect of BBEA Order 2:

The plaintiff was required to prove and verify any of the disputed documents that fell within the permissible scope of the BBEA orders under ss 4 and 5 of the BBEA. Failing that, the plaintiff was not permitted to rely on the disputed documents on the strength of the EA.

[101] The learned judge ought to have dismissed encl 307 and BBEA Order 2 ought not have been made. Enclosure 395 ought to have been treated only as applying to copies of documents produced under BBEA Order 1, and, to that end all the documents produced under BBEA Order 1 ought to have been determined as inadmissible under the BBEA on ground that those documents were not admissible under the EA.

[102] In the result, our unanimous decison are as follows:

(a) the second and third defendants' appeals in Civil Appeal 179 is allowed with an order that encl 307 be dismissed and BBEA Order 2 be set aside;

(b) the second and third defendants' appeals in Civil Appeal 715 is allowed with an order that the documents produced under BBEA Order 1 are inadmissible, and that all copies of those documents be expunged from the court file;

(c) the plaintiff's Civil Appeal 741 is dismissed; and

(d) all costs will be costs in the cause.

Appeal Nos 179 and 715 allowed; Appeal No 741 dismissed.

Reported by Dzulqarnain bin Ab Fatar